

Court of Appeals, State of Michigan

ORDER

People of MI v Keith Brooks

Docket No. 289008

LC No. 07-006594-01

Kirsten Frank Kelly
Presiding Judge

Brian K. Zahra

Christopher M. Murray
Judges

The Court orders that the motion for immediate consideration is GRANTED.

Pursuant to MCR 7.205(D)(2), in lieu of granting leave to appeal, the October 31, 2008, order of the Wayne County Circuit Court, which granted defendant's motion for a new trial, is REVERSED. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show, among other matters, that the evidence itself, not merely its materiality, was newly discovered. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). In this case, the evidence upon which defendant relied in his motion for a new trial was not newly discovered since the matter was raised during the testimony of the prosecution's first witness. Because the information underlying the defense allegation of a "pattern" of behavior by this witness became known to defendant and his trial counsel before trial was completed, it cannot constitute "newly discovered evidence" upon which a new trial may subsequently be granted. See *People v Robbins*, 223 Mich App 355, 360-361; 566 NW2d 49 (1997); *People v Cummings*, 42 Mich App 108, 110; 201 NW2d 358 (1972); *People v LoPresto*, 9 Mich App 318, 324; 156 NW2d 586 (1968). See also, generally, *People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961) and *People v Pizzino*, 313 Mich 97, 109-110; 20 NW2d 824 (1945). Therefore, the trial court erred as a matter of law in ruling that the evidence was newly discovered. Accordingly, the matter is REMANDED to the trial court for sentencing. The trial court shall conduct sentencing within 30 days of the Clerk's certification of this order.

The motion for stay is DENIED as moot.

Judge Kelly would retain jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 22 2009

Date

Sandra Schultz Mengel

Chief Clerk